STATE OF MICHIGAN

COURT OF APPEALS

BRUCE W. WOLFORD and REBECCA L. WOLFORD,

Plaintiffs-Appellants,

v

SCOTT McGRADY,

Defendant-Appellee,

and

TODD SCRIMA, TOM COBURN, DAVID JOHNSTON, EUGENE LeMARBE, KEVIN NEEB, and GENO BRUSH,

Defendants.

UNPUBLISHED
February 21, 2003

No. 234405
Oakland Circuit Court
LC No. 1998-008993-NO

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant, and we affirm.[1]

I. Facts and Procedural History

On September 12, 1995, plaintiff sustained an injury when he stepped into a hole in front of his home in Waterford Township. In his complaint, plaintiff alleged that, during a routine "flushing" procedure to remove rust and other buildup from area fire hydrants, defendant, a Waterford Township employee, allowed the high-pressure water stream to create the twelve to eighteen-inch deep hole.[2] When plaintiff returned home from work on the evening of September

[1] Because Rebecca Wolford's claims are wholly derivative, the singular "plaintiff" refers to Bruce Wolford unless otherwise specified.

[2] Plaintiff filed his complaint against several Waterford Township employees, but appeals only the trial court's grant of summary disposition to Scott McGrady. The parties filed a stipulation to dismiss the other defendants on November 9, 2001.

12, he did not see the hole and accidentally stepped into it as he was walking around his truck to remove some tools. Plaintiff maintains that defendant was grossly negligent for failing to inspect the area for safety hazards after flushing the hydrant and for failing to repair the hole.

The trial court granted defendant's motion for summary disposition on August 11, 2000. Specifically, the trial court ruled that (1) defendant is immune from tort liability because plaintiff failed to establish a genuine issue of material fact that defendant was grossly negligent, and (2) plaintiff failed to establish a genuine issue of material fact regarding causation.[3] The trial court denied plaintiff's motion for reconsideration on April 30, 2001.

II. Analysis

Generally, government employees are immune from tort liability for injuries caused while acting within the scope of their authority and while engaged in the discharge of a governmental function. MCL 691.1407(2). Plaintiff brought this action against defendant and alleged that his conduct falls under the "gross negligence" exception to governmental immunity. *Id*. The governmental immunity statute defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Under this exception, a governmental employee may be held liable if his gross negligence is the proximate cause of the plaintiff's injury or, in other words, the employee's gross negligence must be "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Furthermore, "[t]his Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).[4]

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[3] The trial court also ruled that defendant did not owe plaintiff a duty of due care under the "public duty doctrine." Though plaintiff challenges that ruling on appeal, defendant concedes that he is not protected by the doctrine under our Supreme Court's ruling in *Beaudrie v Henderson*, 465 Mich 124; 631 NW2d 308 (2001), which was released after the trial court issued its opinion and order in this case. However, because the trial court correctly granted summary disposition to defendant for other reasons, we need not analyze this issue further.

[4] Defendant brought his motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10) but, in its opinion and order, the trial court stated that it relied on MCR 2.116(C)(10) in deciding the motion. We conclude, however, that defendant is also entitled to summary disposition under MCR 2.116(C)(7). " 'If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart.' " *Detroit News, Inc v Policemen and Firemen Retirement System of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002), quoting *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). "MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Furthermore:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a

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Here, plaintiff claims that the trial court erred by granting summary disposition to defendant because plaintiff raised a genuine issue of material fact that defendant's gross negligence proximately caused plaintiff's injuries. We disagree.

Plaintiff has not established that defendant flushed the hydrant in front of plaintiff's home or that defendant did so in a grossly negligent manner. While defendant admitted he was one of four water department employees flushing hydrants in the general area on or near the date in question, defendant testified that he had "no idea" which hydrants he flushed and had "no idea" whether he did or did not flush the hydrant at issue. Further, plaintiff did not present documentary evidence or testimony of other employees to establish that defendant flushed the hydrant. Rather, the essence of plaintiff's claim is that, because defendant did not offer an unqualified denial that he flushed the hydrant at issue, he must have done so. Plaintiff further asserts that because *someone* opened the hydrant on or around September 12, 1995, and because a hole appeared near the hydrant, defendant must have been grossly negligent in flushing the hydrant, he must have failed to inspect the area after flushing it, and he must have recklessly failed to fill the hole he created. Because "plaintiff is unable to prove the actual occurrence of a negligent act" by defendant, he appears to be relying on the doctrine of *res ipsa loquitur* "to create at least an inference of negligence." *Maiden, supra* at 127. However, as our Supreme Court held in *Maiden*:

> "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones v Porretta*, 428 Mich 132, 150 ; 405 NW2d 863 (1987). While the doctrine of res ipsa loquitur may assist in establishing ordinary negligence, the doctrine is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct. [*Id*.]

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> motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.

The *Maiden* Court also set forth the legal standards for motions decided under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden, supra* at 119-120.]

As the *Maiden* Court further noted, "[t]o establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, *not on the result of those actions*." *Id*. at 127 n 10 (emphasis added). Accordingly, that plaintiff stepped into a hole which may have been formed by water from the hydrant does not alone "support the conclusion that *defendant's* actions were so reckless 'as to demonstrate a substantial lack of concern for whether an injury results.' " *Id*. (emphasis added). In other words, the mere fact that a hole appeared near the hydrant, even if caused by water from the hydrant, does not create a genuine issue of material fact regarding defendant's liability. From this evidence, a reasonable juror could not find defendant grossly negligent where no evidence shows that he acted recklessly or, indeed that his conduct had any relationship to plaintiff. Therefore, "plaintiff failed to meet [his] burden to come forward with specific facts to support [his] claim that defendant[']s conduct was grossly negligent." *Id*. at 128.[5]

Moreover, were we to find that plaintiff offered sufficient facts for a reasonable juror to conclude that defendant flushed the hydrant, that he failed to properly use a diffuser and failed to notice or fill the hole, this conduct merely constitutes ordinary negligence, not gross negligence. In *Maiden*, our Supreme Court held that "[t]he plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was *substantially more than negligent*." *Maiden, supra* at 122 (emphasis added). For that reason, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Id*. at 122-123. We conclude that, as a matter of law, defendant's alleged conduct does not amount to gross negligence.

Plaintiff acknowledges that a senior employee, David Johnston, testified that it takes two years to learn to properly flush a fire hydrant and that the incident in this case occurred on defendant's second day on the job. Furthermore, as noted, other than the presence of the hole in the ground, plaintiff has not shown that defendant failed to inspect the area or that his failure to see the hole violated department rules. Indeed, evidence concerning the information defendant had regarding the specific problems with this hydrant and the standards the Water Department expected him to follow is unclear and inconsistent at best. Johnston testified that he wrote specific instructions for certain hydrants on pieces of paper, but another senior employee, Geno Brush, testified that he usually memorized the information and threw the instructions away. Further, no evidence indicates that Brush instructed defendant about the hydrant at issue. Moreover, regarding the "standard of care," Brush and Water Department Superintendent Jerry Thomas Coburn testified that employees were merely expected to use "common sense" in flushing hydrants and, as Coburn testified, "*if* they see a safety hazard . . . " employees should fix it. (Emphasis added.)

Accordingly, were we to find that plaintiff raised a genuine issue of fact that defendant failed to properly flush the hydrant, that the hydrant created the hole in which plaintiff fell and

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[5] For similar reasons, the trial court correctly ruled that plaintiff failed to raise a genuine issue of material fact that defendant's actions proximately caused plaintiff's injuries. The record evidence is simply insufficient to allow a reasonable juror to find that " 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

that defendant failed to notice or fix the hole, this conduct constitutes negligence, not gross negligence as defined by the statute. For the above reasons, defendant's actions, if proven, simply do not rise to the level of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Therefore, the trial court correctly granted defendant's motion for summary disposition because defendant is entitled to immunity granted by law and plaintiff failed to raise a genuine issue of material fact regarding the gross negligence exception to governmental immunity. MCR 2.116(C)(7) and (C)(10).

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette